

Honorable Robert S. Lasnik

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

CITY OF SEATTLE, a municipal corporation
located in the County of King, State of
Washington,

Plaintiff,

v.

MONSANTO COMPANY, SOLUTIA INC.,
and PHARMACIA CORPORATION, and
DOES 1 through 100,

Defendants.

Case No.: 2:16-cv-00107-RSL

**PLAINTIFF'S MOTION FOR
PROTECTIVE ORDER**

NOTE ON MOTION CALENDAR:
January 17, 2020

Complaint Filed: January 25, 2016
Trial Date: September 14, 2020

I. Requested Relief

Plaintiff, the City of Seattle, moves for a protective order ruling that: 1) Plaintiff not be required to produce Mediation Privileged documents in response to Defendants' discovery requests or to disclose the substance of its mediation communications; and, 2) Defendants may not use the City's Mediation Privileged documents or any of the City's mediation communications in this litigation.

II. Facts

Defendant Pharmacia issued the following Request for Production:

REQUEST FOR PRODUCTION NO. 39:

All DOCUMENTS produced, served, filed, or otherwise provided by YOU in the ALLOCATION PROCEEDING, including but not limited to YOUR disclosure questionnaire responses, Section 104(e) responses, position papers, affidavits or declarations, deposition testimony, expert reports, and rebuttal reports.

1 Pharmacia defined “ALLOCATION PROCEEDING” as follows:

2 “ALLOCATION PROCEEDING” shall mean and refer to the alternative dispute
3 resolution process entered into by YOU and other parties pursuant to the Alternative
4 Dispute Resolution Memorandum of Agreement signed by YOU on April 7, 2014.

5 Wishik Declaration, Ex. A, p.2.

6 The “ALLOCATION PROCEEDING” is a voluntary, confidential alternative dispute
7 resolution process. Forty-four parties are engaged in that process, commonly known as the Duwamish
8 Allocation, in an effort to resolve their respective shares of past and future costs for investigation and
9 remediation of the Lower Duwamish Waterway. The Duwamish Allocation began in 2014 and is
10 ongoing. Wishik Declaration, ¶3.

11 The Duwamish Allocation is governed by an agreement (the Allocation MOA) that provides:

12 The Participating Parties intend that their communications with the Allocator and with
13 one another during the Allocation Process, whether written or oral, be kept confidential
14 among the Participating Parties and the Allocator to the fullest extent allowed by law.
15 The Allocation Process shall be considered a mediation that is covered by RCW
16 42.56.600 (exemption from public disclosure for records of mediation communications)
17 and RCW 7.07.030 (mediation communications are privileged).

18 Wishik Declaration, Ex. B (MOA Section 5.1.5.4).¹ The Allocation MOA also provides:

19 Neither this MOA nor any information submitted or any action taken by any Participating
20 Party pursuant to this MOA shall constitute, be interpreted, construed, or used as evidence
21 of any admission of liability, law or fact, a waiver of any right or defense, nor an estoppel
22 against any Participating Party.

23 *Id.*, (Section 15).

24 The City does not object to the entirety of Pharmacia’s RFP No. 39. The City has already
25 produced to Defendants tens of thousands of documents that the City provided to the Allocation and
26 that exist outside of the Allocation, such as the City’s responses to EPA’s requests for information
27 under CERCLA Section 104(e), sampling data from the City’s stormwater system and from City
28 facilities, information on City facilities and operations, deposition transcripts from prior litigation,

¹ The Allocation MOA is not privileged because it was provided to EPA and to parties that were invited but declined to participate in the Allocation. It also was part of King County’s case against its insurers. Wishik Declaration, ¶5.

1 affidavits and declarations by City witnesses in prior litigation, and environmental reports on
2 contaminated sites in the Duwamish drainage area. Wishik Declaration, ¶6.

3 The City has objected and refused to produce documents that the City developed solely for the
4 Allocation, because any such documents are subject to the Mediation Privilege. These include: the
5 City's responses to an extensive questionnaire from the Allocator regarding each of the City's
6 facilities; the City's responses to further questions by the Allocator and/or by other Allocation Parties;
7 correspondence between the City and the Allocator and/or other Allocation Parties; the City's briefs on
8 legal issues presented to the Allocator; declarations by City staff regarding Allocation issues; Position
9 Papers by the City addressing the factual, legal and technical bases for its recommendations to the
10 Allocator; and reports developed by City experts for the Allocation. *Id.*, ¶7.

11 The Defendants are well aware of the confidentiality provisions of the Allocation MOA
12 because Pharmacia is participating in the Allocation. Defendants' First Amended Answer to First
13 Amended Complaint, Dkt #91, p. 52:16-18. Pharmacia is also aware that the meaning and scope of the
14 confidentiality provisions in the Allocation MOA was previously litigated in a case by King County
15 against its insurers. *King County v. The Travelers Indemnity Co. et al.*, 2:14-cv-01957-BJR (W.D.
16 Wash.). There, insurers in King County's case sought discovery of documents produced and developed
17 by other parties in the Allocation. Here, the Defendants seek discovery of documents the City
18 developed for the Allocation. The differences in the discovery requests are not determinative, because
19 the Allocation MOA provides that all communications are covered by the Mediation Privilege.

20 In *King County*, the City intervened solely to oppose disclosure of Mediation Privileged
21 documents. The Allocator for the Duwamish Allocation, attorney John Barkett, an experienced mediator
22 and arbiter, provided his analysis and construction of the Allocation MOA. He explained:

23 ADR processes work because each participant knows that the process is confidential.
24 Indeed, in this matter, I have relied on the confidentiality of the process to demand the
25 utmost in due diligence from each Participant in responding to Disclosure
26 Questionnaires. Voluntary disclosure is fundamental to the integrity of the process.

1 *King County v. Travelers*, 2:14-cv-01957-BJR, Dkt # 647, p. 9.² He construed Section 15 of the
 2 Allocation MOA, which provides that, no “information submitted or any action taken by any
 3 Participating Party pursuant to this MOA shall constitute, be interpreted, construed, or used as evidence
 4 of any admission of liability, law or fact, a waiver of any right or defense, nor an estoppel against any
 5 Participating Party.” The Allocator concluded that: “This provision is expressly designed to limit
 6 information developed by each Participating Party to the confines of this mediation-confidential
 7 process.” *Id.*, at p.10. The provision “would bar any Participant in this process” from using such
 8 information in litigation. *Id.*

9 Judge Rothstein denied the insurers’ Motion to Compel in King County’s case, saying, “At the
 10 very least, if the Court were to order disclosure of the documents at issue, going forward parties to
 11 mediations would have legitimate doubts about future enforcement of the protections the Washington
 12 legislature sought fit to provide.” 2:14-cv-01957-BJR, Dkt # 672, p. 7:22-24. The Court’s finding in
 13 *King County* is equally applicable to the Request at issue here.

14 15 **III. Legal Argument**

16 **A. A Motion for Protective Order is Appropriate.**

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 18 In order to prevent annoyance or oppression, a party may seek a protective order forbidding the
 19 disclosure or discovery of requested information or materials. FRCP 26(c)(1). To obtain a protective
 20 order, the party resisting discovery must show “good cause” for its issuance. FRCP 26(c)(1).

21 Here good cause exists because Defendants’ RFP 39 seeks documents that are explicitly
 22 privileged as mediation communications. Discovery of privileged matters goes beyond the legitimate
 23 scope of information to be obtained during discovery even if relevant to a party’s claims or defenses.
 24 FRCP 26(b)(1) [“Parties may obtain discovery regarding any nonprivileged matter that is relevant to
 25 any party’s claim or defense and proportional to the needs of the case. (emphasis added)]. Such
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27
 28 ² A courtesy copy is Exhibit – to the Declaration of Laura Wishik, filed in support of this motion.
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1 privileged information is absolutely protected from disclosure. Further, a protective order is
 2 appropriate regarding mediation privileged materials already obtained by Defendants.

3 B. The City should be protected from producing its mediation communications or the
 4 substance of them.

5 Washington has adopted the Uniform Mediation Act. It applies when, “The mediation parties
 6 and the mediator agree to mediate in a record that demonstrates an expectation that mediation
 7 communications will be privileged against disclosure.” RCW 7.07.020 (1)(b). The Allocation MOA
 8 satisfies this requirement.

9 The statutory definitions include:

10 “Mediation communication” means a statement, whether oral or in a record or verbal or
 11 nonverbal, that occurs during a mediation or is made for purposes of considering,
 12 conducting, participating in, initiating, continuing, or reconvening a mediation or
 retaining a mediator.

13 RCW 7.07.010(2). The documents the City developed solely for the Allocation are “made for the
 14 purposes of . . . participating” in a mediation and thus are “mediation communications.”

15 The statute provides that:

16 (1) . . . [A] mediation communication is privileged as provided in subsection (2) of this
 17 section and is not subject to discovery or admissible in evidence in a proceeding unless
 waived or precluded as provided by RCW 7.07.040.

18 (2) In a proceeding, the following privileges apply:

19 (a) A mediation party may refuse to disclose, and may prevent any other person
 20 from disclosing, a mediation communication.

21 RCW 7.07.030. The City is exercising its right to “refuse to disclose” the City’s mediation
 22 communications.

23 The City’s position papers in the Allocation present the City’s recommendations to the
 24 Allocator regarding its own and the other parties’ shares of liability. They are precisely the type of
 25 communication that Washington’s Mediation Act is intended to protect. As Judge Pechman recognized
 26 in a 2010 case:

1 The mediation statement Defendants seek to use in this litigation falls squarely under
2 the mediation privilege. It is a document that was prepared for purposes of conducting
and participating in a mediation . . . A clearer application of the Mediation Act's
privilege is difficult to imagine.

3 *W. & Clay, LLC v. Landmark Am. Ins. Co.*, C09-1423 MJP, 2010 WL 1881880, at *1 (W.D.
4 Wash. May 10, 2010).

5 Although there are exceptions to the Mediation Privilege, none of them apply in this case.
6 RCW 7.07.050. Further, when counsel for the City conferred with counsel for Monsanto, Monsanto's
7 counsel did not assert that one of the exceptions applied to the City's mediation communications.
8 Rather, Defendants' counsel contended that the City had waived the privilege. Julius Dec. ¶2. The
9 statute addresses waiver of the privilege:

10 A privilege under RCW 7.07.030 may be waived in a record or orally during a
11 proceeding if it is expressly waived by all parties to the mediation and:

12 (a) In the case of the privilege of a mediator, it is expressly waived by the
mediator; and

13 (b) In the case of the privilege of a nonparty participant, it is expressly waived
by the nonparty participant.

14 (2) A person that discloses or makes a representation about a mediation communication
15 which prejudices another person in a proceeding is precluded from asserting a privilege
under RCW 7.07.030, but only to the extent necessary for the person prejudiced to
16 respond to the representation or disclosure.

17 (3) A person that intentionally uses a mediation to plan, attempt to commit, or commit a
crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from
18 asserting a privilege under RCW 7.07.030.

19 RCW 7.07.040. The City has not disclosed or made a representation about a mediation communication
20 which prejudices the Defendants. Wishik Decl., ¶8. None of the statutory waiver provisions apply to
21 the present case, therefore the City should be protected from producing its mediation communications
22 or the substance of them in discovery.

23 C. Defendants should be prohibited from using the City's mediation communications in this
24 case.

25 The statute provides that, "A mediation party may refuse to disclose, and may prevent any
26 other person from disclosing, a mediation communication." RCW 7. 07.030. Pharmacia is a party in
27 the Allocation and in this case. The Allocation MOA limits parties' from using Mediation Privileged

documents outside of the Allocation. Wishik Dec., Ex. – (MOA Section 15). The Allocator ruled that, “This provision is expressly designed to limit information developed by each Participating Party to the confines of this mediation-confidential process.” *Id.*, at p.10.

Here, the City is concerned that defense counsel may have obtained the City’s Mediation Privileged documents from Pharmacia and is using them in this case. The City notified Defendants that it objects to the use of such documents outside of the Allocation. Julius Dec., ¶3. As of the time of this filing, defense counsel have not denied they are using such documents. *Id.*, ¶6. The Court’s intervention is necessary to insure that Defendants not use the City’s mediation communications in this case.

The City asks the Court to enter a Protective Order barring the Defendants from using the City’s Mediation Privileged documents and any of the City’s mediation communications in this case. If defense counsel have such documents, they should be required to destroy them and any related notes or references. If the City’s mediation communications have been disclosed to defense experts, those experts should be identified and barred from testifying in this case.

The City respectfully asks the Court to enter a Protective Order and has provided a draft with this motion.

Dated: January 9, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2020 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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